

(f) *Note accounts.* For purposes of this section, note accounts are not borrowings.

[54 FR 49552, Nov. 30, 1989, as amended at 55 FR 7300, Mar. 1, 1990; 55 FR 13515, Apr. 11, 1990; 57 FR 14345, Apr. 20, 1992; 57 FR 33438, July 29, 1992]

§ 563.81 Issuance of subordinated debt securities and mandatorily redeemable preferred stock.

(a) *General*—(1) *Savings associations receiving standard treatment.* No savings association subject to standard treatment of its applications under § 516.5 of this chapter may issue subordinated debt securities or mandatorily redeemable preferred stock includable in regulatory capital pursuant to this section or amend the terms of such securities unless it has obtained the written approval of OTS. Approval of the issuance under this section, in order to meet the requirements of § 567.5 of this chapter, may be obtained either before or after the securities are issued. No approval shall be granted unless issuance of the securities and the form and manner of filing of the application are in accordance with the provisions of this section.

(2) *Savings associations receiving expedited treatment.* No savings association eligible for expedited treatment under § 516.5 of this chapter may issue subordinated debt securities or mandatorily redeemable preferred stock pursuant to this section for inclusion in regulatory capital or amend the terms of such securities unless it provides notice to OTS, and such notice contains a statement of the association's intent to include such securities in regulatory capital. Notice should be made 30 days in advance of an issuance of subordinated debt securities or mandatorily redeemable preferred stock under this section, if the association intends to qualify such securities or stock as supplementary capital under § 567.5(b)(2) of this chapter. Notice may be made either before or after such securities are issued, but will only be includable in regulatory capital (to the extent permitted by § 567.5(b) of this chapter) if the issuance of the securities and the filing of the notice are in accordance with the provisions of this section and the savings association certifies, in

writing, to the Office that all regulatory requirements have been met. The Office reserves the right to determine after the 30-day notice period has expired that the issuance does not comply with the requirements of this section or those of Part 567 for inclusion in capital.

(b) *Eligibility requirements.* In determining whether an issuance of subordinated debt securities or mandatorily redeemable preferred stock is includable in the regulatory capital of a savings association pursuant to this section, the OTS will consider the following factors:

(1) Whether the issuance of such securities by the savings association is authorized by applicable law and regulation and is not inconsistent with any provision of the savings association's charter or bylaws. Proof of such provision shall be submitted with the notice or application;

(2)(i) Whether, in the opinion of the OTS the overall policies, condition and operation of the savings association do not afford a basis for supervisory objection to the application or notice. The OTS shall establish guidelines that shall identify supervisory bases that may be used to object to the inclusion of specific subordinated debt and preferred stock issuances as regulatory capital. Such guidelines shall constitute illustrative but not exclusive bases for supervisory objection to subordinated debt and mandatorily redeemable preferred stock applications and notices. Such bases for supervisory objection may include, but are not limited to instances where:

(A) Regulatory capital, without regard to the amount of any subordinated debt and mandatorily redeemable preferred stock to be included in regulatory capital, does not meet the requirements of § 567.2 of this chapter;

(B) Actual and expected losses have not been offset by specific and general valuation allowances to the extent required pursuant to § 563.160 and § 563.172 of this part; and

(C) Actual and anticipated income from operations, after distribution of earnings to the holders of savings accounts, payment of dividends on outstanding equity securities and payment

of interest on borrowings but before income taxes, is not demonstrably sufficient for payment of dividends and redemption price, discount and related expenses of the proposed issuance.

(ii) The OTS may modify the guidelines in paragraph (b)(2)(i) of this section from time to time, as appropriate, and any such changes shall be effective for those applications and notices filed after the date of the changes to the guidelines and for those applications and notices submitted to the OTS but not yet deemed "complete."

(3) Whether the issuance of such securities by the savings association in the transaction and any related transactions will result in a transfer of risk from the Savings Association Insurance Fund or the Bank Insurance Fund, as the case may be, to parties other than savings associations. In this connection, the issuance of subordinated debt securities shall not be deemed to result in a sufficient transfer of risk if such securities or any indenture or related agreement pursuant to which they are issued provides for events of default or includes other provisions that could result in a mandatory prepayment of principle by declaration or otherwise, other than events of default arising out of the obligor's failure to make timely payment of interest and principal, its failure to comply with reasonable financial, operating and maintenance covenants of a type that are customarily included in indentures relating to publicly offered issues of debt securities, and events of default relating to certain events of bankruptcy or insolvency, receivership and similar events.

(c) *Form of application or notice; supporting information.* Applications subject to standard treatment or notices eligible for expedited treatment under §516.5 of this chapter must be in the form prescribed by OTS. The form of application and instructions for a savings association subject to standard treatment, and instructions for a notice by a savings association subject to expedited treatment, may be obtained from the OTS. Information and exhibits shall be furnished in support of an application or notice in accordance with the applicable instructions, setting forth all of the terms and provi-

sions relating to the proposed issuance and showing that all of the requirements of this section have been or will be met.

(d) *Requirements as to securities.* Subordinated debt securities and mandatorily redeemable preferred stock issued pursuant to this section shall meet all of the following requirements unless one or more of such requirements, not including paragraphs (d)(1)(i)(A) and (d)(1)(ii) of this section which are not eligible for waiver, are waived by the OTS:

(1) *Form of certificate.* Each certificate evidencing subordinated debt or mandatorily redeemable preferred stock issued by a savings association pursuant to this section shall:

(i) Bear on its face, in bold-face type, the following legends:

(A) "This security is not a savings account or deposit and it is not insured by the United States or any agency or fund of the United States"; and

(B) "Absent prior written approval by the Office, this security is not eligible for purchase by any savings association or a corporate affiliate thereof, except that this security may be purchased by a corporate affiliate of the issuer or by any diversified savings and loan holding company and any non-savings association subsidiary thereof."

(ii) Clearly state that the security—

(A) Is subordinated on liquidation, as to principal, interest, and premium, if any, to all claims (including post-default interest) against the savings association having the same priority as savings account holders or any higher priority;

(B) Is unsecured by the assets of the issuing association, or any of its affiliates; and

(C) Is not eligible as collateral for any loan by the issuing association.

(iii) In connection only with a certificate evidencing subordinated debt, state or refer to a document stating the terms under which the issuing savings association may prepay the obligation, which shall include at least the right to prepay without premium or other penalty during the fifteen months immediately prior to the maturity date;

(iv) State or refer to a document stating that, in connection with a certificate evidencing subordinated debt, no voluntary prepayment of principal shall be made and that no payment of principal shall be accelerated and, in connection with a certificate evidencing mandatorily redeemable preferred stock, no voluntary redemption, other than scheduled redemptions, shall be made without the approval of the OTS if the savings association is failing to meet its regulatory capital requirements under part 567 of this chapter or, if after giving effect to such payment, the association would fail to meet such regulatory capital requirements;

(v) State the limitations upon payment of interest or dividends, as appropriate imposed by 12 U.S.C. 1828(b); and

(vi) In connection only with a certificate evidencing subordinated debt, set forth, in the certificate and the purchase agreement or indenture, precisely the following statement:

Notwithstanding anything to the contrary in this certificate (or in any related document); (A) if the FDIC shall be appointed receiver for the issuer of this certificate (the "issuer") and in its capacity as such shall cause the issuer to merge with or into another financial institution, or in such capacity shall sell or otherwise convey part or all of the assets of the issuer to another financial institution or shall arrange for the assumption of less than all of the liabilities of the issuer by one or more other financial institutions, the FDIC shall have no obligation, either in its capacity as receiver or in its corporate capacity, to contract for or to otherwise arrange for the assumption of the obligation represented by this certificate in whole or in part by any financial institution or institutions which results from any such merger or which has purchased or otherwise acquired from the FDIC as receiver for the issuer, any of the assets of the issuer, or which, pursuant to any arrangement with the FDIC, has assumed less than all of the liabilities of the issuer. To the extent that obligations represented by this certificate have not been assumed in full by a financial institution with or into which the issuer may have been merged, as described in this paragraph (A), and/or by one or more financial institutions which have succeeded to all or a portion of the assets of the issuer, or which have assumed a portion but not all of the liabilities of the issuer as a result of one or more transactions entered into by the FDIC as receiver for the issuer, then the holder of this certificate shall be entitled to payments on this obligation in accordance with the

procedures and priorities set forth in any applicable receivership regulations or in orders of the FDIC relating to such receivership.

(B) In the event that the obligation represented by this certificate is assumed in full by another financial institution, which shall succeed by merger or otherwise to substantially all of the assets and the business of the issuer, or which shall by arrangement with the FDIC assume all or a portion of the liabilities of the issuer, and payment or provision for payment shall have been made in respect of all matured installments of interests upon the certificates together with all matured installments of principal on such certificates which shall have become due otherwise than by acceleration, then any default caused by the appointment of a receiver for the issuer shall be deemed to have been cured, and any declaration consequent upon such default declaring the principal and interest on the certificate to be immediately due and payable shall be deemed to have been rescinded.

(C) This security is not eligible to be purchased or held by any savings association or corporate affiliate thereof except that this security may be purchased or held by a corporate affiliate of the issuer or by a diversified savings and loan holding company and its non-savings association subsidiaries. The issuer of this security may not recognize on its transfer books any transfer made to a savings association or any corporate affiliate thereof (except as provided in the preceding sentence) and will not be obligated to make any payments of principal or interest on this security if the owner of this security is a savings association or any corporate affiliate thereof (except as provided in the preceding sentence).

(2) *Limitation as to term.* No subordinated debt security or mandatorily redeemable preferred stock issued by a savings association pursuant to this section shall have an original period to maturity or required redemption of less than seven years. During the first six years that such a security is outstanding, the total of all required sinking fund payments, other required prepayments, required purchase-fund payments, required reserve allocations and required redemptions with respect to the portion of such six years as have elapsed shall at no time exceed the original principal amount or original redemption price, thereof multiplied by a fraction, the numerator of which is the number of years that have elapsed since the issuance of the security and

the denominator of which is the number of years covered by the original period to maturity or required redemption.

(3) *Limitations on sale to certain associations.* (i) No savings association may sell any subordinated debt securities issued pursuant to this section to a Federal Home Loan Bank or, except with prior written approval of the Office in a supervisory case, to the FDIC; and

(ii) Without the prior written approval of the Office, no savings association may sell, either directly or indirectly through an underwriter or otherwise, any subordinated debt securities issued pursuant to this section to a savings association or any corporate affiliate thereof, except that a savings association may sell such securities to its corporate affiliates or to a diversified savings and loan holding company and its non-savings association subsidiaries.

(4) *Indenture.* An issuer must use an indenture, as described herein, for subordinated debt securities offered pursuant to this section. Such an indenture must provide for the appointment of a trustee other than the obligor or an affiliate of the obligor (as defined in 12 CFR 583.2) and provide for the collective enforcement of the rights and remedies of the security holders, if the aggregate amount of debt securities "publicly offered" (sales in a private non-public offering as defined in 12 CFR 563g.4 are excluded) and sold by a single obligor in any consecutive twelve month period exceeds \$2,000,000 and/or \$5,000,000 in any consecutive thirty-six month period.

(e) [Reserved]

(f) *Additional requirements.* The Office may impose on the savings association such requirements or conditions with regard to the securities or the offering or issuance thereof as it may deem necessary or desirable for the protection of purchasers, the savings association, the Office, or the Savings Association Insurance Fund or the Bank Insurance Fund, as the case may be.

(g) *Limitation on offering period.* Following the date of approval of an application by a savings association subject to standard treatment by the OTS, or the earlier of the date of non-objection

by the OTS of a notice by a savings association eligible for expedited treatment or 30 days after submission of a notice by such a savings association, unless the OTS has rejected such notice or issued a request for additional information on such notice, the association shall have an offering period of not more than one year in which to complete the sale of the subordinated debt securities or mandatorily redeemable preferred stock issued pursuant to this section. The Office may in its discretion extend such offering period if a written request showing good cause for such extension is filed with it not later than 30 days before the expiration of such offering period or any previous extension thereof.

(h) *Reports.* Within 30 days after completion of the sale of the subordinated debt securities or mandatorily redeemable preferred stock issued pursuant to this section, the savings association shall transmit a written report to the OTS stating the number of purchases, the total dollar amount of securities sold, and the amount of net proceeds received by the savings association. The association's report shall clearly state the amount of subordinated debt or mandatorily redeemable preferred stock, net of all expenses, that the association intends to be counted as regulatory capital.

(i)—(j) [Reserved]

(k) *Conditions of approval and acceptance for subordinated debt and mandatorily redeemable preferred stock applications and notices.* Issuance of subordinated debt and mandatorily redeemable preferred stock applications and notices shall be subject to the following conditions:

(1) Where securities are to be sold pursuant to an offering circular required to be filed with the OTS pursuant to 12 CFR 563g.2, and where such offering circular has not yet been declared effective prior to the date of approval of or nonobjection to the subordinated debt or preferred stock application or notice, the offering circular in the form declared effective shall not disclose any material adverse information concerning the savings association's business, operations, prospects, or financial condition not disclosed in the latest form of offering circular

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filed as an exhibit to the application or notice;

(2) The savings association shall submit to the OTS no later than 30 days from the completion of the sale of the securities, certification of compliance with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities;

(3) The savings association shall submit to the OTS no later than 30 days from the completion of the sale of the securities, the report(s) required by paragraph (h) of this section and the following additional items:

(i) Three copies of an executed form of the securities issued pursuant to the subject application or notice and a copy of any related agreement or indenture governing the issuance of securities; and

(ii) A certificate from the principal executive officer of the savings association that states that to the best of his or her knowledge, none of the securities issued pursuant to the subject application or notice were sold to any association whose accounts are insured by the Savings Association Insurance Fund, or a corporate affiliate thereof, except as permitted by 12 CFR 563.81;

(4) That as of the date of approval or nonobjection, there have been no material changes with respect to the information disclosed in the application or notice as submitted to the OTS;

(5) The savings association receives prior written approval or nonobjection from the OTS for any post-approval amendment to the securities or any related indenture if:

(i) The proposed amendment modifies or is inconsistent with any provision of the securities, or the indenture that is required to be included therein by the OTS's regulations as may then be in effect or would result in a transfer of risk to the savings association or the Savings Association Insurance Fund or the Bank Insurance Fund, as appropriate; and

(ii) All or a portion of the proceeds from the issuance and sale of the securities would continue to be included in the regulatory capital of the savings association following adoption of the amendment;

(6) The savings association shall submit to the OTS promptly after execu-

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tion, one copy of each amendment to the securities or the related indenture, made after approval or nonobjection, and if prior approval of or nonobjection to such amendment was not obtained, shall also state the reason(s) such prior approval or nonobjection was not required; and

(7) Before any offers or sales of the securities are made on the premises of the association or its affiliates, the savings association shall submit to the OTS a set of policies and procedures for such sale of the securities satisfactory to the OTS.

[54 FR 49552, Nov. 30, 1989, as amended at 55 FR 13515, Apr. 11, 1990; 57 FR 14345, Apr. 20, 1992; 62 FR 66262, Dec. 18, 1997; 66 FR 13008, Mar. 2, 2001]

Subpart D [Reserved]

Subpart E—Capital Distributions

SOURCE: 64 FR 2809, Jan. 19, 1999, unless otherwise noted.

§ 563.140 What does this subpart cover?

This subpart applies to all capital distributions by a savings association ("you").

§ 563.141 What is a capital distribution?

A capital distribution is:

(a) A distribution of cash or other property to your owners made on account of their ownership, but excludes:

(1) Any dividend consisting only of your shares or rights to purchase your shares; or

(2) If you are a mutual savings association, any payment that you are required to make under the terms of a deposit instrument and any other amount paid on deposits that the OTS determines is not a distribution for the purposes of this section;

(b) Your payment to repurchase, redeem, retire or otherwise acquire any of your shares or other ownership interests, any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in your total capital under § 567.5 of this chapter, and any extension of credit to finance an affiliate's acquisition of your shares or interests;